U.S. Department of Homeland Security
20 Massachusetts Avenue N.W. Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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JAN 31 2005

[redacted]

FILE: [redacted] Office: ST. PAUL, MINNESOTA Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, St. Paul, Minnesota. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted and the previous decisions of the District Director and the AAO will be affirmed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(2)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(C), for being an alien who an immigration officer has reason to believe is or has been an illicit trafficker in a controlled substance. Additionally the applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is the beneficiary of an approved Petition for Alien Relative filed by his U.S. citizen spouse. He seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States and reside with his U.S. citizen spouse and child.

The District Director concluded that the applicant is not eligible for any relief or benefit from this application and denied the application accordingly. *See District Director's Decision* dated September 20, 2001. The decision was affirmed by the AAO on appeal. *See AAO Decision,* dated February 28, 2003.

The record reflects that on November 9, 1991, and on January 7, 1992, the applicant was arrested in Los Angeles, California for Possession/Purchase Cocaine Base for Sale. In both instances the record shows that a juvenile petition was requested but no disposition was included in the record of proceedings. Based on the above-mentioned arrests the District Director found the applicant inadmissible under Section 212(a)(2)(C) of the Act, which states:

> Controlled substance traffickers.-
>
> any aliens who the consular officer of the Attorney General knows or has reasons to believe-
>
>> (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with other in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so.....is inadmissible.

In the motion to reopen counsel states that the applicant is not an illicit trafficker since the District Director's finding was based on a printout of the two arrests and that the arrests did not lead to processing of a juvenile petition or a conviction. Additionally counsel states that at the time of the arrests the applicant was under 18 years of age and therefore he was a juvenile and his crimes are not inadmissible offenses. Furthermore counsel states that the record of proceedings does to clarify the amount of the controlled sustenance in order for the applicant to be found inadmissible under 212(a)(2)(C) of the Act.

In *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), the Board held that an actual conviction of a drug-trafficking offense or violation is not necessary to establish the ground of inadmissibility under section 212(a)(2)(C) of the Act. Further, one of the factors considered by the Federal Courts to determine whether possession of a controlled substance shall also be deemed sufficient to support a finding that the individual has also engaged in illicit drug trafficking, is the amount of illicit drugs discovered. If the amount of the illicit drug is large enough, trafficking may be inferred on this basis alone. *Matter of Franklin*, 728 F.2d 994 (8th Cir., 1984).

The Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. 5031, as amended by the Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. 93-415, 88 Stat. 1133 (effective September 7, 1974), defines a juvenile as a person who has not attained his 18th birthday.

The AAO find counsel's argument persuasive. The record of proceedings in the present case does not reveal specific details as to the applicant's arrests or the amount of illicit drugs discovered. The record clearly reflects that the applicant was a juvenile at the time of the above-mentioned arrests. Furthermore the record does not disclose the results of these arrests although the record shows that a juvenile petition was requested. The AAO finds that the information in the record of proceedings does not support a finding of inadmissibility under section 212(a)(2)(C) of the Act. Nevertheless, this office finds that the applicant is clearly inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of a crime involving moral turpitude.

Section 212(a)(2) of the Act states in pertinent part, that:

> (A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
>
> . . . .

Section 212(h) of the Act provides, in pertinent part, that:

> (h) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . . .
>
> > (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

The record reflects that on September 23, 1994, in Santa Monica, California the applicant was convicted of the offenses of Criminal Conspiracy and Attempted Grand Theft Auto. The applicant was sentenced to 24 months probation, 45 days imprisonment and restitution. Imposition of the sentence was suspended. The applicant is inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act, due to his conviction of a crime involving moral turpitude (attempted grand theft).

In his motion to reopen counsel asserts that the Municipal Court of Santa Monica Judicial District, County of Los Angeles, State of California expunged the applicant's theft conviction on October 22, 1998, pursuant to section 1203.4 of the California Penal Code. Counsel states that because the applicant's conviction was expunged, the applicant was not "convicted" for immigration purposes and is thus not inadmissible.

The transcript submitted shows that on October 22, 1998, the court granted a petition to expunge the applicant's 1994 convictions. However, the transcript does not indicate what portions of the applicant's

record was expunged. Event if the AAO accepted that the court expunged all of his 1994 offenses, he was convicted of attempted grand theft.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Once an alien is subject to a "conviction" as that term is defined at section 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure. *See Matter of Roldan-Santoyo,* I&N Dec. 3377 (BIA 1999). The Ninth Circuit Court of Appeals held that a State Court action setting aside a theft conviction under a rehabilitative scheme did not eliminate the immigration consequences of that offense. *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001). Moreover, in *Ramirez-Castro v. INS,* 287 F.3d 1172 (9th Cir. 2002), the Ninth Circuit clarified that California Penal Code section 1203.4 provides a limited expungement even under state law, and that it is reasonable to conclude that, in general, a conviction expunged under that provision remains a conviction for purposes of federal law. Therefore the court's decision to expunge the applicant's conviction cannot be considered. The applicant remains "convicted" for immigration purposes, of a crime of moral turpitude, and he is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act.

As stated above section 212(h) of the Act provides that a waiver of the bar to admission resulting from section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

In the present case, the applicant must demonstrate extreme hardship to his U.S. citizen spouse or child.

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the BIA deemed relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

On appeal, counsel submitted a psychological report in which it is stated that the applicant's spouse (Ms. [redacted] and child would suffer financial hardship if the applicant were not permitted to remain in the United States. Additionally it is stated that the long-term affects the applicant's removal would have on his child would likely be negative in light of his critical and positive role in the child's life so far. Further the evaluation states that career opportunities and professional training for Ms [redacted] would be severely hindered if her husband were not there to provide financial assistance. The psychologist concludes with a recommendation that the applicant be granted residency in the United States because breakup of the family would result in extreme hardship. The report was based on one interview with the Buenrostro family and discusses general hardship that would be imposed on Ms. [redacted] and her child if the applicant were to leave the United States.

The record of proceedings does not make clear whether the applicant's spouse and child will follow him to Mexico if he is removed. If the applicant is removed to Mexico his U.S. spouse and child would possibly some suffer hardship, but there is no indication that it would impact them at a level commensurate with extreme hardship. If the applicant's spouse and her child were to accompany the applicant to Mexico, it would be expected that some economic, linguistic and cultural difficulties would arise. No evidence exists that Ms. Buenrostro and her child would not be able to adjust to life in Mexico if they were to relocate with the applicant.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In addition, *Perez v. INS,* 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined "extreme hardship" as hardship that was unusual or beyond that which would normally be expected upon deportation. *Hassan v. INS, supra,* held further that the uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. The U.S. Supreme Court additionally held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

A review of the evidence in the record, when considered in its totality reflects that the applicant has failed to establish that his U.S. citizen spouse or child would suffer extreme hardship if he were removed from the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the prior AAO's decision dismissing the appeal will be affirmed.

ORDER: The order of February 28, 2003, dismissing the appeal is affirmed.